National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: January 13, 1997

TO: James S. Scott, Regional Director, Region 32

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: Bud Antle, Inc., Case 32-CA-15269

460-5067-6300, 530-6067-2020, 530-6067-2060-1700

This Section 8(a)(5) case was submitted for advice as to whether the Employer unlawfully implemented a performance standards proposal affecting only temporary replacements during a lockout and/or engaged in surface bargaining. Bud Antle, Inc, Case 32-CA-15269

facts

1. Preliminary History

Employer Bud Antle and UFCW Local 78-B (the Union) were parties to a collective bargaining agreement that expired in March 1989.[(1)] The parties were far apart on economic issues (particularly wages) throughout bargaining for a successor agreement, prompting the Union to call a surprise strike which was followed by a lockout of unit employees. The Union charged herein that the Employer bargained in bad faith, conduct which necessarily led to the strike and lockout.

The Union represents employees working at the Employer's cooling facilities throughout California where produce is refrigerated prior to shipment to customers. The bargaining unit at issue herein worked at the Employer's Marina facility located near Salinas, California, and was comprised of three distinct employee groups: maintenance employees, production employees and forklift loaders.

Negotiations for a successor contract were difficult and frustrating for both sides; from the very first bargaining session, the Union repeatedly made strike threats. On August 28, after ten bargaining sessions, the Union called an unannounced economic strike. The Employer subsequently declared an impasse in bargaining and implemented its final proposal two days later.

During the strike, the Employer operated exclusively with temporary replacements; no bargaining unit employees returned to work. Three weeks into the strike the Employer locked out the entire bargaining unit, alleging that striking employees had engaged in acts of sabotage. Subsequent negotiations between the parties were fruitless and, on November 14, the Union unconditionally offered to return to work. The Employer, however, refused to lift the lockout and allow bargaining unit employees to return to work until the parties reached agreement on a successor contract. The Employer and the Union bargained sporadically until May 1990 when they met for the last time. The Employer continues to operate the Marina facility solely with temporary replacements.[(2)]

The Union had been certified by the California Agricultural Labor Relations Board (ALRB) in 1976. Between 1989 and 1993, the ALRB investigated and held a hearing over a series of state unfair labor practice charges against the Employer. On January 10, 1994, an ALRB administrative law judge issued a Recommended Decision finding that the Employer failed to bargain in good faith, and thus that its subsequent course of action was unlawful, including the declaration of impasse, implementation of contract terms, lockout, and refusal to reinstate employees.[(3)] The state ALJ based his conclusion primarily on the Employer's refusal to match the Union's movement on "major" bargaining issues with "significant" concessions of its own, while dismissing Bud's movement on "less important economic area[s]" such as holidays and vacations.[(4)] For instance, the ALJ criticized the Employer's modification of its initial jurisdiction proposal as "hardly a major collective bargaining concession,"

one which was insufficient to ameliorate "the drastic nature" of the Employer's other bargaining positions.(5) The ALJ also found bad faith from the Employer's allegedly "misleading" explanations for its conduct and bargaining positions,(6) "reluctance" to provide the Union with financial information to support its proposals,(7) and its "hasty" declaration of impasse.(8)

Meanwhile, in 1991, Region 21 concluded that Bud Antle was a nonagricultural employer as of the date of the filing of a UC petition, and thus was under the jurisdiction of the NLRB, not the ALRB. On September 9, 1994, the Court of Appeals for the Ninth Circuit enjoined the ALRB's proceedings on the grounds that the National Labor Relations Act preempted state regulation of the dispute.(9) The Union filed the instant Section 8(a)(5) charge on December 15, 1994, almost a year after the ALRB issued its decision, and more than five years since the parties broke off bargaining and the Employer locked out employees.(10)

2. Bargaining History

According to the California ALJ as well as the parties, wages and employee benefits were the primary issues during bargaining.(11) Under the 1986 collective bargaining agreement, maintenance employees were paid a straight hourly wage, while production employees and loaders earned hourly wages supplemented by piece rates. Under the 1986 contract, maintenance employees, production employees and forklift loaders averaged $15.72/hour, $19.85/hour and $27.29/hour, respectively. Under these rates, forklift loaders earned upwards of approximately $60,000 per year.

The parties entered into negotiations far apart on economics and remained that way throughout the course of bargaining. Complaining of frozen wages during the ten negotiation sessions just prior to the strike, the Union demanded a 40 percent hourly wage increase for loaders and production employees, a 29 percent increase in the maintenance employee hourly rate, a 27 percent increase in the loader piece rate, and a 58 percent increase in the production employee piece rate. The Employer, on the other hand, entered bargaining with the objective of significantly reducing labor costs; it rejected the Union's demand for double-digit percentile wage increases. In particular, the Employer told Union representatives that forklift loaders' wages -- upwards of $60,000 per year -- already were far in excess of their skills and way out of line with pay for the rest of the bargaining unit and other fork lift operators in the area.(12) The Employer further explained that it was particularly concerned that a plan to automate the facility would significantly improve production, thereby causing the loaders' piece rate pay to skyrocket even higher.

Therefore, the Employer began negotiations by demanding a flat $10.00 hourly rate for all production employees and loaders (amounting to as much as a 10.8 percent rate cut) and the elimination of the loader piece rate, to be replaced with the lesser piece rate for production employees. The Employer proposed to retain maintenance employees' hourly wage rate and production employees' piece rate. However, should the planned automation reduce the size of the workforce, the Employer proposed to reserve for itself the right to adjust the employee piece rate downward to ensure that it received a "return on investment," so long as employees' aggregate pay remained at least $12.50/hour. The Employer explained its reasoning to the Union, citing its need to "contain" and "realign" labor costs. However, it did not raise its wage proposals throughout bargaining.(13) The Union adamantly attempted to retain the old wage structure for all employees. Its lead negotiator told Employer representatives during an August 29 bargaining session that the proposed elimination of the loaders' piece rate had so antagonized unit employees that there could be no contract without it.

The parties remained far apart on other economic issues. The Employer had just withdrawn from a contractual pension plan by paying a substantial withdrawal liability to affected employees. It subsequently rejected any further pension benefits, demanded a cheaper health and welfare plan, and proposed to retain the holiday and vacation schedules, subject to a new qualification that employees work a minimum number of hours during the previous year. The Union, on the other hand, initially sought a 58 percent increase in pension contributions, one additional holiday, three additional weeks vacation time for senior employees (comprising almost half of the unit), and a 12.5 percent increase in the Employer's health and welfare contributions. The Union significantly lowered these demands after the bargaining unit went out on strike. The Employer, however, refused to budge from its initial fringe benefit package, other than to offer a 25 percent reduction in the qualifying hours for vacations and holidays.(14)

The Employer also sought for the first time to establish employee performance standards.[(15)] Initially, standards would be adopted for only two employee classifications, including loaders. However, the Employer reserved the right to implement standards for other job functions and/or to modify existing standards at any time during the term of the agreement. Establishment and implementation of performance standards would not be subject to the grievance and arbitration procedure, except for suspensions and discharges, comprising the third and fourth steps of a progressive discipline policy. However, even then the Employer would retain total discretion to set standards and determine compliance with them, except for instances when a production breakdown or a problem with product quality interfered with employee performance. The Union categorically rejected the Employer's proposal, which remained unmodified during the course of bargaining.

The Employer met regularly with the Union over the course of ten bargaining sessions prior to the strike, as well as further, post-strike sessions. There is no allegation or any evidence that the Employer engaged in any misconduct at or away from the table. As set forth above, on September 11, 1989, the Employer implemented its final offer as to replacement employees, including the performance standards proposal. In May 1990, after having survived the strike and lockout for over eight months, the Employer modified its previous wage proposal to eliminate the piece rate entirely while increasing the hourly rate by 50 cents per hour.[(16)] The Employer explained that, in light of its experience operating the plant during the lockout, its previous proposal was no longer competitive with industry-wide conditions. During the penultimate bargaining session approximately two months later, the Union significantly reduced its hourly rate demands, while retaining much of the prior piece rate. Nonetheless, the parties' positions on wages remained far apart; the gap between the Union's and the Employer's proposals concerning production employees' wages exceeded $6.00 per hour.

The Employer has only employed temporary replacements throughout the strike and subsequent lockout; it has not returned any of the locked-out employees to work.[(17)] Thus, the Employer has never applied the terms of the implemented offer, including the performance standards clause, to any bargaining unit employee.

action

We conclude that for the following reasons the instant charges should be dismissed in their entirety, absent withdrawal.

1. The Employer Lawfully Insisted to Impasse on, and

Implemented as to Non-Unit Employees, its Performance

Standards Proposal

In Colorado-Ute, the Board concluded that an employer lawfully can insist to impasse on a merit pay proposal which gave the employer unlimited discretion to determine merit wage increases, but that a bargaining impasse did not privilege the employer's unilateral exercise of its discretion in granting merit increases.[(18)] The Board subsequently refined its reasoning in McClatchy Newspapers,[(19)] where it concluded that discretionary merit increase proposals, where there has been no good faith bargaining over criteria and procedures, timing and amounts, fall into the narrow class of mandatory subjects that cannot be implemented after impasse, i.e., that such a proposal constitutes an exception to the "implementation after impasse" rule. The Board held that unilateral implementation of such proposals -- even after good-faith impasse -- is inconsistent with the employer's established duty to bargain over procedures and criteria for determining merit increases for bargaining unit employees because, without negotiating over procedures and criteria, the union would be unable to bargain knowledgeably about unit employees' ever-changing wage rates or to explain to unit employees how intervening changes to their wages had been formulated. The Board further noted that excluding the union from bargaining over the unit's wages would disparage it in the eyes of unit employees by depicting the union's "incapacity to act as the employees' representative in setting terms and conditions of employment."[(20)]

Thus, the Board in McClatchy predicated its finding of a violation upon the dangers to the collective bargaining process should the employer implement a discretionary increase proposal as to unit employees. The Board repeatedly stressed the destabilizing effect that unilateral changes to unit employees' terms and conditions of employment would have on the collective bargaining process if the parties had not first bargained to good-faith impasse over procedures and criteria. There is

nothing in the Board's decision, however, to suggest that an employer is similarly powerless to unilaterally set working conditions for its non-unit employees, because there is no reason to conclude that negotiations over unit employees' terms and conditions would thereby be disrupted or that the setting of non-unit employees' wages would disparage the union in the eyes of unit employees.

In Harter Equipment,[(21)] the Board held that temporary replacements are not unit employees and thus that their retention during an otherwise lawful lockout does not violate Section 8(a)(3). In Goldsmith Motors Corp.,[(22)] the Board further held that an employer lawfully may unilaterally implement terms and conditions of employment for replacements during a lockout, even absent an impasse in bargaining and even if the implemented conditions are at variance with the locked out employees' former terms. The Board noted that the union's representational role is directed toward the interests of the locked-out unit employees and not the replacements. Accordingly, the Board concluded that an employer does not undermine the union's representational authority vis-à-vis unit employees solely by setting working conditions for temporary replacements.

From the above, we conclude that the Board's holding in McClatchy does not impact on the Employer's ability to lawfully implement employment terms affecting only non-unit replacement employees. Here, the Employer implemented its performance standards proposal only as to temporary replacements. Since unit employees remain locked out, the Employer necessarily has never implemented the performance standards proposal as to them. Per McClatchy Newspaper and Colorado-Ute, the Employer lawfully insisted to impasse on the proposal, even though it would afford the Employer substantial discretion in determining performance standards, and even though the parties have not bargained to impasse on criteria or timing. However, the McClatchy Board's prohibition against unilateral implementation of such a discretionary provision as to unit employees is inapposite here, since unit employees have not been affected. Accordingly, the Employer did not violate the Act by implementing its performance standards proposal as to its temporary replacement employees.

The instant matter is factually distinguishable from those cases in which Chairman Gould and Member Browning have enunciated a desire to overrule, and recent cases in which the General Counsel has argued in favor of overruling, Service Electric Co.[(23)] to the extent that the Board there held that employers have no obligation to bargain over terms and conditions of employment for permanent replacements during an economic strike.[(24)] Gould and Browning argued in those cases that an employer's bargaining obligation extends to both economic strikers and their permanent replacements, because all such employees are members of the bargaining unit. However, as set forth above, temporary replacements during a lockout are not bargaining unit members.[(25)] Thus, Chairman Gould and Member Browning's rationale has no force herein.

This matter is also distinguishable from those cases in which the General Counsel has argued that employers cannot unilaterally set terms and conditions of employment for temporary replacements during an unfair labor practice strike.[(26)] The General Counsel argued in those cases that the Board should not allow wrong-doers to continue to reap the benefits of their unfair labor practices by affording them the right to unilaterally set replacements' employment terms. This analysis is inapposite herein since**,** under the circumstances of this case**,** the Employer exercised its lawful right to lock out unit employees primarily in support of its wage demands, rather than its performance standards proposal or by otherwise benefiting from its own unlawful conduct. Both parties acknowledge that wages and benefits were the pivotal issues at the table, not the Employer's proposed performance standards clause. For instance, the Union's lead negotiator told Employer representatives that there could be no contract without an agreement on loaders' piece rates. Insofar as disagreement over traditional mandatory subjects of bargaining led directly to the lockout, we need not reach the more difficult question as to whether an employer precludes good faith bargaining and/or discriminatorily coerces unit employees by locking them out in support of a Colorado-Ute issue. Thus, since the lockout here was not discriminatory or in furtherance of a bad-faith bargaining position, nor did the Union engage in an unfair labor practice strike, we conclude that the Employer was not reaping the benefits of unlawful conduct by unilaterally setting terms and conditions of employment for its temporary replacements.

2. The Employer did not Engage in Surface Bargaining

Section 8(d) of the Act does not require parties engaged in collective bargaining to agree on their respective proposals, but does require "more than a willingness to enter upon a sterile discussion of union-management differences."[(27)] The parties must enter discussions with open and fair minds and with the purpose of reaching agreement.[(28)] Thus, an employer is

"obliged to make some reasonable effort in some direction to compose his differences with the union ...."[(29)] Further, a "take it or leave it" attitude, while not per se violative, is evidence of bad faith.[(30)]

The Board draws a distinction between lawful "hard bargaining" and unlawful "surface bargaining." The Board will find bad faith bargaining based in part on the content of the employer's proposals. The Board's examination of a party's "bargaining position and proposals relates to whether they indicate an intention by the Respondent to avoid reaching an agreement; it is not a subjective evaluation of their content."[(31)] Thus, the Board will not determine whether a proposal is acceptable or unacceptable to a party. Rather, the Board will "consider whether, on the basis of objective factors, a demand is clearly designed to frustrate agreement on a collective-bargaining contract."[(32)] In doing so, the Board looks at the totality of the Respondent's conduct, not just the proposals themselves.[(33)] Moreover, the Board will evaluate a party's proposals in light of its perceived bargaining strength.[(34)]

An employer does not necessarily breach its bargaining obligation under the Act merely by seeking deep reductions in wages and benefits. In A.M.F. Bowling Co.,[(35)]

the Board rejected the ALJ's finding that the employer had bargained in bad faith because the ALJ had relied on a "subjective evaluation of the [employer's] proposals ...." In that case, a new owner had just bought the employer's two-plant operation, negotiated a new agreement at one plant, and assumed an existing labor agreement at the second plant which was to expire about three months later. Immediately after the purchase, the employer cut expenses drastically, in part by laying off non-bargaining unit employees. At that time, the union announced its intent to terminate the agreement on the expiration date and requested bargaining. The union's initial proposal called for an eight percent wage increase for each of two years and increased benefits. On the other hand, the employer's first proposal called for a 24 percent wage reduction and a 14 percent reduction in fringe benefits. In addition, although its first proposal anticipated retention of a job-grade structure, the employer's second proposal included an overhaul of that structure, based on the results of an intervening study of the operation. The employer justified its call for a wage and benefit reduction and the job-grade changes by saying that it needed to become competitive in the market.

The Board observed that the circumstances justified the Employer's proposed "deep reductions" in wages because the employees at the employer's other plant had agreed to a 24 percent wage cut just before the sale of the business and the Union eventually showed "flexibility" toward the proposals. The Board noted that "the Respondent viewed itself as being in a strong bargaining position and not readily susceptible to pressure to make concessions."[(36)] The Board cited Concrete Pipe & Products Corp.,[(37)] where it held that "[a]n employer's desire to bring its labor costs in line with its competitors, standing alone, is not an illegitimate bargaining goal."

In contrast, the Board has found unlawful surface bargaining based, in part, on bargaining proposals which are "so comprehensive as to preempt the union's representative function and to leave unit employees with less protection than they had prior to electing collective-bargaining representation ...."[(38)] For instance, in A-1 King Size Sandwiches,[(39)] the employer insisted on unilateral control over merit increases; manning; scheduling and hours; layoff, recall, and the granting and denial of leave; promotion, demotion and discipline; the assignment of work outside the unit; and changes to past practice. The employer's contract proposal also contained a broad no-strike clause and an "essentially illusory" grievance-arbitration procedure. The Board found a Section 8(a)(5) violation, adopting the ALJ's finding that the employer's proposals, "would strip the union of any effective method of representing its members ...."[(40)] The Board further noted that, if accepted, the proposed contract would have left the union with substantially fewer rights than if it relied solely on its certification.[(41)]

On the other hand, insistence to impasse on discretionary control over specific, limited issues does not unlawfully strip a union of its representational role. In Cincinnati Enquirer,[(42)] the Board held that the employer lawfully insisted on a merit pay proposal limited to wage increases, thus distinguishing the matter from Harrah's Marina Hotel & Casino, supra, in which the employer unlawfully insisted on total control over all aspects of wages.

We conclude, in agreement with the Region, that in this case the evidence is insufficient to establish that the Employer

bargained in bad faith. Thus, while both parties showed "a real desire to reach agreement and enter into a collective-bargaining agreement," both also are "stand[ing] firm on a position" that each "reasonably believe[d] ... is fair and proper or that [each] ha [d] sufficient bargaining strength to force the other party to agree." (43)

The surface bargaining allegation is based entirely on the Employer's proposals. Thus, as set forth infra, the evidence does not establish that the Employer engaged in any procedural tactics designed to frustrate bargaining. The Employer met to bargain with the Union at reasonable times in reasonable places, responded to the Union's requests for information, explained its bargaining positions, and imbued its representatives with sufficient authority to negotiate on its behalf.

The Employer's substantive proposals fail to evince an intent to frustrate negotiations. Both parties acknowledge that wages and benefits were the make-or-break issues. Nonetheless, the Employer's attempt to "realign" labor costs, obviously unpalatable to the Union, are not illegitimate. As the Board noted in Concrete Pipe:

Proposals that seek deep reductions in allegedly noncompetitive existing benefits are not necessarily indicative of a desire to frustrate negotiations. The General Counsel presented no evidence that the Respondent was factually inaccurate when it informed the Union at the outset of negotiations that its competitors (which the Respondent specifically named) had "very low" labor costs in comparison to the Respondent. An employer's desire to bring its labor costs in line with its competitors, standing alone, is not an illegitimate bargaining goal. If those competitors happen to be nonunion, it does not necessarily follow that an employer's attempt to bargain for comparable wages and benefits means that the employer is seeking to frustrate negotiations in order to rid itself of the Union. (44)

Thus, the Board rejected the judge's "subjective evaluation" that the employer's economic proposals were "inherently unreasonable." (45)

Apparently, neither of the parties at the negotiating table was willing to reach a middle ground. For the entire period prior to the strike, the Union demanded double-digit percentile increases in wages; as late as August 29, the day after the unit went out on strike, the Union continued to insist that the there could be no contract without the loaders' piece rate. The Employer, on the other hand, demanded analogously deep reductions in wages and benefits. Although the Employer remained firm in most of its demands, it is clear that there was no "take-it-or-leave-it" attitude. The Employer explained its belief that wages, particularly for loaders, had gotten out of line with the labor market in general and would have skyrocketed even further with impending automation, and it compromised on a variety of minor issues, some of them economics. It is clear that the Employer's perceptions regarding wage rates -- particularly for forklift loaders whose pay reached upwards of $60,000 per year while some competitors paid similarly situated employees $6.00/hour -- constitute a legitimate reason to demand concessions. (46) Moreover, the Employer, after having successfully weathered the pre-emptive, three-week strike and subsequent lockout, had the right to review its previous proposals and develop bargaining positions which reflected its new-found economic strength. (47)

Accordingly, we conclude that the Employer engaged in lawful hard bargaining, as opposed to surface bargaining in violation of Section 8(a)(5). In so concluding, we would distinguish the instant matter from A-1 King Size Sandwiches and its progeny. With the exception of the productions standards proposal, the Employer's demands do not involve the Union's representational functions; they concern economics. Thus, the Employer did not propose any significant modification of the previous contract's management rights clause, the no-strike/lockout clause or the grievance/binding arbitration procedure. Although the Employer lawfully bargained to impasse on the ability to unilaterally set employees' performance standards, this measure falls far short of the type of extreme demand for total, unilateral control over wages and other employment terms which is irreconcilable with the duty to bargain in good faith. (48) Thus, as opposed to cases in which the Board has found an employer's proposals to be so harsh as to evidence unlawful surface bargaining, (49) the Union's capacity to function as a collective-bargaining representative would be relatively undiminished and the Union would clearly be better off with the Employer's final offer than it would be in reliance solely on its certification.

In agreement with the Region, we further conclude that the California ALJD does not conform to Board principles insofar as the judge held that the Employer engaged in unlawful surface bargaining. The ALJ criticized the Employer for failing to meet

the Union's concessions with "significant" concessions of its own concerning "major" contract issues. In other words, the ALJ apparently concluded that the Employer's "drastic" proposals to cut wages must be tempered by "significant" concessions in order to evidence lawful intent. This is a fundamental misunderstanding of Board law in that it ignores the Board's oft-repeated warning against engaging in a "subjective evaluation of the Respondent's proposals ...."(50) In the absence of evidence that, in the totality of the circumstances, an employer intended to deprive a union of the ability to function as an effective representative of employee interests, the Board declines to sit in judgment as to whether a party's substantive bargaining goals are "acceptable" or "unacceptable" to the party across the table.(51) Here, as set forth above, the Employer did not make proposals (e.g., restrictive arbitration, jurisdiction or union security proposals) which would have stripped the Union of its representative functions. Rather, the Employer demanded admittedly "drastic" reductions in wages -- particularly for forklift loaders earning upwards of $60,000 per year -- to levels more in line with those for the rest of the industry. As set forth above, the Employer's demand for wage concessions is not evidence of a desire to disrupt collective bargaining negotiations, particularly in the face of an unsuccessful strike which served to greatly strengthen its bargaining posture.(52)

In further disagreement with the California ALJ, we conclude that the evidence is insufficient to establish that the Employer misled the Union during bargaining, failed to provide it with bargaining information or prematurely declared an impasse in bargaining. The Employer was under no legal obligation to lift its lockout without first securing favorable contract terms merely because the Union promised to attempt to curb further alleged acts of sabotage if unit employees were allowed to return. The Employer similarly had no obligation to provide the Union with internal financial data in the absence of an assertion of an inability to pay wages sought by the Union.(53) The Employer's lawful refusal to provide the Union with such information, then, cannot simultaneously support an inference of bad faith. Finally, we agree with the Region that the Employer did not prematurely declare impasse. On August 29, the Union displayed its fixed determination not to accept reduced wages when its chief negotiator told the Employer that there could be no agreement without retaining the loaders' piece rate. Approximately one week later, after three months of hard bargaining, the Union continued to demand an across-the-board wage increase -- one which was even greater than the demands the Union outlined to the Employer a week previously and despite the Employer's "Final Proposal" seeking significant wage concessions. We accordingly conclude that as of the declaration of impasse, there was no reasonable expectation of a meeting of minds in the future.(54) Thus, for all of the above reasons, we conclude that the California ALJD does not conform to Board principles in holding that the Employer engaged in unlawful surface bargaining.

Accordingly, the charges should be dismissed in their entirety, absent withdrawal.

B.J.K.

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[1] All dates are in 1989 unless specified otherwise.

[2] Despite the length of time since the employees went on strike and were subsequently locked out, there is no evidence that they have been permanently replaced. To the contrary, the Employer has promised to return employees to work as soon as the parties agree to a successor contract.

[3] In the Matter of Bud Antle, Inc., Case No. 89-CE-36-SAL, et al., California Agricultural Labor Relations Board (January 10, 1994) (hereinafter "ALRB Decision"). The California Agricultural Labor Relations Act, §1155.2(a), apparently is based on the National Labor Relations Act insofar as it obligates employers and unions to "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment ... but such obligation does not compel either party to agree to a proposal or require the making of a concession."

[4] ALRB Decision at p. 64, citing General Electric Co., 150 NLRB 192 (1964), enf'd 418 F.2d 736 (2d Cir. 1969).

[5] Id. at 66.

[6] For instance, the ALJ concluded that the Employer's refusal to lift the lockout after the Union promised to investigate and attempt to curb acts of employee misconduct was intentionally designed to frustrate bargaining inasmuch as it violated the Employer's "obligation to deal frankly and honestly" with the Union. Id. at 72-76. The ALJ similarly concluded that Bud's failure to specifically alert the Union to a modification in its jurisdiction proposal which it had already proffered to the Union breached the Employer's "obligation to deal honestly and candidly" with the Union. Id. at 81.

[7] When the Union asked for cost information used by the Employer to support its claimed competitive disadvantage, the Employer retracted the claim, insisting instead that it merely desired to reduce forklift drivers' pay to industry levels. While finding no independent statutory violation, the ALJ concluded that the Employer's "hasty retreat and contorted explanation" did not "openly and honestly" fulfill its bargaining obligations. Id. at 78.

[8] On September 7, the Union presented a new proposal, approximately one week after the start of the strike and the Employer's proffer of its "Final Proposal." The proposal contained reduced economic demands, although the Union still sought overall wage increases for all employees which were higher than those it discussed with the Employer in an August 29 meeting. The Union did not modify its initial bargaining proposal in any other way. Although the ALJ acknowledged that the Union and the Employer remained extremely far apart on economic issues, he reasoned that in order to stay within the bounds of the law, the Employer should have attempted to solicit further concessions from the Union prior to declaring impasse two days later. Id. at 81-82.

[9] Bud Antle, Inc. v. Barbosa, 45 F.3d 1261 (9th Cir. 1994).

[10] The Office of Appeals has concluded that the instant charge was timely filed under Section 10(b). See Bud Antle, Inc., Case 21-CA-30425, Appeals Minute dated October 5, 1995.

[11] ALRB Decision at p. 12.

[12] The Employer states that it provided the Union with information during bargaining that some of its competitors paid forklift drivers $6.00 per hour.

[13] The table illustrates the prior status quo as well as the parties' wage proposals during the strike period:

1986 CBA Union Employer

Initial Final

Prod	$9.88-11.08/hr	+$5.00/hr	+$1.50/hr[1] +$1.75 piece		flat $10/hr no change
	$3.00 piece rate	+$2.00 piece			
Loader	$10.945/hr	+$5.00/hr	+COLA +$1.00 piece		-$0.945/hr -$0.75 piece[2]
	$3.75 piece rate	+$1.30 piece			
Maint	$14.28-15.23/hr		+$5.00/hr	+$1.50/hr[1]	no change

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[1] Over three years.

[2] Using the lower, production employee piece rate.

[14] Although the Employer remained firm on many of its proposals throughout bargaining, it raised the potential floor on hourly earnings from $12.50 to $12.75, relinquished its demand for unfettered right to discipline probationary employees, and offered an enhanced absenteeism policy. The Employer also accepted some of the Union's language proposals where they differed

with its own and agreed to continue to recognize the Union despite any changes to its organizational structure.

[15] The Employer made this proposal separately from its economics package; apparently it would have had no direct effect on wages.

[16] The Union calculates the net effect of this proposal to be a $5.50 drop in employees' hourly wages.

[17] The California ALJ concluded that the Employer hired temporary, not permanent, replacements during the three week strike period prior to the lockout. ALRB Decision at 34.

[18] Colorado-Ute Electric Ass'n, 295 NLRB 607, 608-10 (1989), enf. den. 939 F.2d 1392 (10th Cir. 1991), cert. den. sub nom. IBEW Local No. 111 v. Colorado-Ute Electric Ass'n, 504 U.S. 955 (1992) (Board held that a proposal for unlimited management discretion in determining merit wage increases required the union's waiver of its statutory rights under Section 8(a)(5) of the Act).

[19] 321 NLRB No. 174 (August 27, 1996), on remand from NLRB v. McClatchy Newspapers, 964 F.2d 1153 (D.C. Cir. 1992).

[20] Id., slip op. at 6.

[21] 293 NLRB 647 (1989).

[22] 310 NLRB 1279 (1993).

[23] 281 NLRB 633, 642 (1986).

[24] Chicago Tribune Co., 318 NLRB 920, 928 n.30 (1995) and Harding Glass Co., 316 NLRB 985 n.5 (1995), enf'd in part 80 F.3d 7 (1st Cir. 1996). See also Detroit Newspapers, Cases 7-CA-38184 et al., Advice Memorandum dated April 10, 1996.

[25] See Harter Equipment, supra.

[26] See Detroit Newspapers, supra; Frontier Hotel & Casino, Cases 28-CA-10027 et al., Advice Memorandum dated April 2, 1996.

[27] NLRB v. American National Insurance Co., 343 U.S. 395, 402 (1952); Atlanta Hilton & Tower, 271 NLRB 1600, 1603 (1984).

[28] NLRB v. Herman Sausage Co., 275 F.2d 229, 231 (5th Cir. 1960), reh'g den. 277 F.2d 793 (5th Cir. 1960); Majure Transport Co. v. NLRB, 198 F.2d 735, 739 (5th Cir. 1952).

[29] Atlanta Hilton & Tower, 271 NLRB at 1603, quoting NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 135 (1st Cir. 1953), cert. den. 346 U.S. 887 (1953).

[30] 88 Transit Lines, 300 NLRB 177, 178 (1990), enf'd 937 F.2d 598 (3d Cir. 1991).

[31] Litton Systems, 300 NLRB 324, 326-27 (1990) (emphasis in original), enf'd 949 F.2d 249 (8th Cir. 1991), cert. den. 503 U.S. 985 (1992).

[32] Reichhold Chemicals, 288 NLRB 69 (1988), aff'd in relevant part 906 F.2d 719 (D.C. Cir. 1990), cert. den. 498 U.S. 1053 (1991); Central Management Co., 314 NLRB 763, 770 (1994).

[33] Atlanta Hilton, 271 NLRB at 1603.

[34] See, e.g., Hendricks Mfg., 287 NLRB 310 (1987).

[35] 314 NLRB 969, 973 (1994).

[36] 314 NLRB at 975.

[37] 305 NLRB 152, 153 (1991), enf'd 983 F.2d 240 (D.C. Cir. 1993).

[38] Logemann Bros Co., 298 NLRB 1018, 1021 (1990).

[39] 265 NLRB 850 (1982), enf'd 732 F.2d 872 (11th Cir. 1984), cert. den. 469 U.S. 1035.

[40] Id. at 859, quoting from San Isabel Electrical Services, 225 NLRB 1073, 1080 (1976).

[41] See also John Ascuaga's Nugget, 298 NLRB 524, 527 (1990), enf'd in rel. part sub nom. Sparks Nugget v. NLRB, 968 F.2d 991 (9th Cir. 1992) (employer's demand for total control of wages, seniority, and work rules "evinces a lack of serious intent to reach agreement"); Harrah's Marina Hotel and Casino, 296 NLRB 1116, 1134 (1989) (employer's insistence on complete unilateral control over wages and benefits absent recourse to the grievance and arbitration procedure would have left employees in worse position than without a contract); Radisson Plaza Minneapolis, 307 NLRB 94, 95 (1992), enf'd 987 F.2d 1376 (8th Cir. 1993) (employer's insistence on retaining unilateral control over wages and benefits "is at odds with the basic concept of a collective-bargaining agreement"); Modern Manufacturing, 292 NLRB 10 (l988) (insistence on proposal to retain absolute discretion over every important economic term of employment and the right to deal directly with employees, while seeking to exclude almost every matter from arbitration, coupled with a broad no-strike clause, constituted bad faith bargaining, insofar as proposals would have deprived the union of a significant representational role).

[42] 298 NLRB 275 (1990), petition for review denied sub nom. Cincinnati Newspaper Guild, Local 9 v. NLRB, 938 F.2d 276 (D.C. Cir. 1991).

[43] Industrial Electric Reels, 310 NLRB 1069, 1071-72 (1993) (citing Atlanta Hilton & Tower, 271 NLRB at 1603).

[44] Concrete Pipe, 305 NLRB at 153.

[45] Ibid.

[46] A.M.F., 314 NLRB at 976; Anaheim Plastics, 299 NLRB 79, 100 (1990).

[47] Hendricks Mfg., 287 NLRB at 310 ("where an employer's economic power increases through the successful weathering of a strike, it is not unlawful for the employer to use its new-found strength to secure contract terms that it deems beneficial," quoting O'Malley Lumber Co., 234 NLRB 1171, 1179 (1978)). Accord: Pipe Line Development Co., 272 NLRB 48, 49 (1984) (after successfully weathering strike and undergoing organizational changes during intervening one-year period, employer lawfully withdrew extensive set of previous proposals); Hickinbotham Bros. Ltd., 254 NLRB 96, 102 (1981) (employer lawfully dropped previous proposals dealing with wages as well as wide variety of contractual terms after having successfully weathered strike).

[48] See, e.g., Cincinnati Enquirer, supra.

[49] See cases cited supra at p. 14 n.41.

[50] A.M.F. Bowling Co., 314 NLRB at 973.

[51] Reichhold Chemicals, 288 NLRB at 69.

[52] See, e.g., A.M.F. Bowling, Concrete Pipe, and Hendricks Mfg., cited supra.

[53] See, e.g., NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956) (unlawful refusal to provide financial information in the face of a claimed inability to pay wages).

[54] See, e.g., Hyatt Regency Memphis, 296 NLRB 259, 316 (1989), enf'd 939 F.2d 361 (6th Cir. 1991) (impasse over wages reached, in the absence of "new arguments, new insights, new approaches, or alternative reasoned arguments").